ESTATE OF JOSEPH RED EAGLE

IBIA 73-1 (Supp.) Decided May 30, 1975

Appeal from an administrative law judge's order denying petition for rehearing.

Affirmed and Dismissed.

1. Indian Probate: Wills: Undue Influence

   The Department of the Interior has held consistently that mere suspicion or an opportunity to influence testator's mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or there was pressure operating directly upon the testamentary act.

2. Indian Probate: Wills: Testamentary Capacity: Generally

> To be competent to make a will the testatrix had to know without prompting not only who were the natural objects of her bounty but also the nature and extent of the property of which she was about to dispose, and the consequences of the dispositions which she was making.

APPEARANCES: Dennis A. Dellwo of Dellwo, Rudolf and Schroder, for appellant, Felix A. Aripa; Walter B. Dauber of Tonkoff, Rakow, Dauber and Shaw for appellee, Hobart C. Bowlby.

OPINION BY ADMINISTRATIVE JUDGE WILSON

Felix A. Aripa, hereinafter referred to as appellant, through his attorneys hereinabove identified, has filed with this Board an appeal from an Administrative Law Judge's decision denying his petition for rehearing in the above-entitled matter.

Joseph Red Eagle, hereinafter referred to as the decedent, executed a last will and testament on August 21, 1957, in favor of Hobart C. Bowlby, a non-Indian, hereinafter referred to as appellee.

The above-entitled matter was remanded by this Board to Administrative Law Judge Snashall on July 30, 1973, for the purpose of conducting a hearing de novo to determine heirs, to approve or disapprove wills and to determine creditors rights, if any. Pursuant to said order the Judge on May 1, 1974, heard the matter at Toppenish, Washington. Thereafter, from the evidence adduced at said hearing the Judge on June 14, 1974, approved the decedent's last will and testament of August 21, 1957, and ordered distribution of decedent's entire trust estate in accordance therewith to the appellee.

Feeling aggrieved by said order of June 14, 1974, the appellant, through his attorneys, filed a petition for rehearing on August 8, 1974. In support of his petition for rehearing the appellant in essence contended:

1. That the findings of the Hearing Examiner (sic) were incorrect and that there was overpowering evidence of undue influence and overreaching on the part of Hobart Bowlby rendering the will executed August 21, 1957, invalid.

2. That there was much evidence available both in the record and available to the court through subpoena, showing that Joseph Red Eagle had insufficient

mental capacity for the execution of the last will and testament at the August 21, 1957, signing.

The Administrative Law Judge on September 20, 1974, denied the petition for rehearing in the following language and for the following reasons:

> Petitioner bases his request for rehearing upon two basic contentions: (1) that the decision upholding the Last Will and Testament is not supported by the evidence, and (2) that he has new evidence tending to show that the testator lacked the prerequisite competency necessary to the execution of his Last Will and Testament.
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> Petitioner's first argument is basically an argument on the facts, or more exactly, upon the purport of the evidence adduced on hearing. I can well understand his interpretation of the evidence since I am certainly not unmindful of the fact there was substantial evidence upon which enumerable inferences could have been raised in support of petitioner's position on the import of the evidence. However, I am bound by the preponderance of the evidence rule and certainly the preponderance of the evidence in this case clearly compels and supports the final Order of which petitioner is aggrieved. I therefore find no basis for rehearing on this ground.
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> The petitioner's second ground for relief, that of new evidence, is formulated on his contention that certain medical records, medical testimony and lay witness testimony in substantiation of the former if produced would establish that decedent's mental capacities were so deteriorated at the time of the signing of the August 21, 1957 Last Will and Testament as to have denied testator the requisite mental capacity. He states however the medical records were not available to him at the first hearing short of subpoena, that the

medical testimony was unavailable due to the illness of the examining physician and that the lay witnesses refused to appear at the hearing except under compulsion of a subpoena. The controlling regulations provide, inter alia, that a Petition for Rehearing based upon newly discovered evidence ". . . shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision." 43 CFR § 4.241(a). Petitioner has not provided "justifiable reasons" for his failure to present this evidence at the time of the hearing prior to the final decision. This matter has been heard twice and the record in both hearings fails to reflect any previous request for the issuance of subpoenas on behalf of petitioner in any case, let alone for the appearance of the persons and records now alleged to be the prevailers of new evidence. Nor did petitioner present, in lieu of witnesses, affidavits of the allegedly illusive witnesses upon a showing of their unavailability. This matter has been pending since at least July 28, 1971, the date upon which petitioner was first given notice of hearing to determine heirs or probate the will of Joseph Red Eagle and he cannot now be heard to complain of an alleged inability to obtain medical records and witnesses he deems essential to his case. The petitioner's request is not timely.

Additionally, and merely as dicta, it does not appear from the documents, records and excerpts of medical testimony filed by petitioner with his argument on behalf of his petition that he would be able to sustain his position in any event. An examination of these attachments disclose an apparent inability upon the part of medical technology to determine with any degree of certainty at what point decedent became legally incompetent to execute a Last Will and Testament. To invalidate a will for lack of testamentary capacity, evidence must show the condition to exist at the time of the execution of the will. Estate of Martha DeRoin, IA-874 (1957). Since the medical testimony would at best be based

upon conjectural determinations it is doubtful such evidence could overcome the clear and concise testimony of the attesting witnesses to the will to the effect the testator was of sound and disposing mind and in full control of his faculties at the time of the execution of the subject Last Will and Testament.

The Administrative Law Judge in furtherance of his denial stated:

> Two hearings were held in this matter in order to give all concerned parties in interest ample opportunity to present their evidence. They were afforded a full and complete hearing with the right of calling whatever witnesses they wished and with full right of cross-examination. The Petition for Rehearing notably fails to set out any additional reason why this matter should again be set for hearing and it does not appear in view of the foregoing conclusions the result in this matter would be changed or altered by granting a rehearing at this time.

It is from said denial of September 20, 1974, that the appellant has appealed to this forum.

The appellant in support of his appeal sets forth substantially the same reasons as those set forth in his petition for rehearing. These reasons in short are:

(1) That undue influence was exerted upon Joseph Red Eagle at the time the will was executed on August 21, 1957.

(2) That Joseph Red Eagle did not have the capacity or competency to make a will on August 21, 1957.

The appellant's first contention that undue influence was exerted on the decedent is without merit. The burden of proving undue influence rested on the appellant. In order to sustain undue influence the evidence must be clear, cogent and convincing. The appellant in the case at bar has failed to do so. At best, the appellant has shown only that mere opportunity existed for the exercise of influence upon the decedent.

[1] The Department of the Interior has held consistently that mere suspicion of an opportunity to influence testator's mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or there was pressure operating directly upon a testamentary act. Estate of Charles Mjissepe (Pack choa be) or Sapesa Polecat, IA-T-3 (May 12, 1967). [Same case as IA-1284 (May 2, 1966.)] To invalidate a will on the ground of undue influence, contestant must show such influence to have been exerted to the extent of destroying the free will of the testator or that the will of another was substituted for that of the testator, and this amounts to more than the opportunity or possibility that undue influence was brought to bear on the testator.

Estate of John J. Akers, IA-D-18 (February 26, 1968). Aff'd Akers v. Morton, 333 F. Supp. 184 (D. Mont. 1971). Aff'd Akers v. Morton, et al., 499 F.2d 44 (9th Cir. 1974).

Appellant's further contention that a fiduciary relationship existed between Mr. Bowlby and the decedent is likewise without merit. The fact that appellee befriended the decedent and transacted business with him over the years certainly did not establish a fiduciary or confidential relationship between the two. Accordingly, no presumption of undue influence was raised thereby. Therefore, the burden of rebutting such a presumption did not fall upon the appellee. The appellant in support of the contention regarding presumption of undue influence cites the Estate of Louis Leo Isadore, IA-P-21 (February 12, 1970); Estate of Julius Benter, 1 IBIA 24 (November 17, 1970). The case at bar is distinguishable from Isadore and Benter; supra, in that Mr. Bowlby, the appellee, did not take an active part in procuring the preparation or the execution of the will in question. The record is quite clear that the decedent went to an attorney of his own choice to have the will drawn and that Mr. Bowlby had no connection therewith nor with the preparation or the execution thereof.

Appellant's second contention that decedent at the time of the execution of the will was not of sound or disposing mind is

likewise without merit. The weight of the evidence clearly indicates that the decedent was of sound and disposing mind at the time of the execution of the last will and testament in question. The appellant has failed to come forth with any evidence to support his contention that the decedent was not of sound and disposing mind when he executed the last will on August 21, 1957.

[2] The Department in the Estate of Ruth B. DeHanas Long, A-25220 (September 21, 1948), regarding the question of competency or testamentary capacity stated:

> To be competent to make a will the testatrix had to know without prompting not only who were the natural objects of her bounty but also the nature and extent of the property of which she was about to dispose, and the consequences of the dispositions which she was making.

The requisite mental capacity which a testator must have to make a valid disposition of his property is the ability to remember, at least in a general and approximate way, the nature and extent of his property, to recognize those who are the natural objects of his bounty, and to comprehend the nature of the testamentary act itself; and, the testator's disinheritance of his heirs and blood relatives is not unnatural per se. Estate of John P. Whitetail, IA-T-23 (April 17, 1970).

Having reviewed the record and considered the briefs of the parties, this Board finds no valid reason to disturb the Order Denying Petition for Rehearing issued September 20, 1974, by Administrative Law Judge Robert C. Snashall and the said order should be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing issued September 20, 1974, by Robert C. Snashall, Administrative Law Judge be, and the same is hereby AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

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Alexander H. Wilson
Administrative Judge

I concur:

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David J. McKee
Chief Administrative Judge